Google Inc. et al v. Egger et al

Doc. 472 Att. 4

EXHIBIT W

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HEARING OF THE SENATE SELECT COMMITTEE ON INTELLIGENCE
PROPOSED FISA MODERNIZATION LEGISLATION

WITNESSES:

MR. MIKE McCONNELL, DIRECTOR OF NATIONAL INTELLIGENCE;

LTG KEITH ALEXANDER, DIRECTOR, NATIONAL SECURITY AGENCY;

MR. KENNETH WAINSTEIN, ASSISTANT ATTORNEY GENERAL FOR NATIONAL SECURITY, DEPARTMENT OF JUSTICE;

MR. BENJAMIN POWELL, GENERAL COUNSEL, OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE;

MR. VITO POTENZA, GENERAL COUNSEL, NATIONAL SECURITY AGENCY

CHAIRED BY: SENATOR JOHN D. ROCKEFELLER IV (D-WV)

LOCATION: 106 DIRKSEN SENATE OFFICE BUILDING, WASHINGTON, D.C.

TIME: 2:30 P.M. EDT
DATE: TUESDAY, MAY 1, 2007

SEN. ROCKEFELLER: This hearing has begun, and I welcome all of our testifiers. And other members of the committee will be coming in. I know some of the caucuses just broke up.

The Select Committee on Intelligence meets today in open session, something we don't ought to do, to consider whether the scope and application regarding the Surveillance Act needs to changed to reflect the evolving needs for the timely collection of foreign intelligence. An extraordinarily complicated subject, this is. At the committee's request, the administration has undertaken a comprehensive review of the Foreign Intelligence Surveillance Act, commonly referred to as FISA. Out of this review, the administration proposed -- it believes would modernize the laws governing the way in which we gather foreign intelligence with the use of electronic surveillance.

Consideration of the administration's proposal and alternatives will be rooted in the Intelligence Committee's 30-year experience with our nation's long and delicate effort to strike that elusive right balance between effective intelligence collection for our national security and the constitutional rights and privacy interests of Americans.

The Intelligence Committee's existence came out of the work of the Church Committee and others in the mid-'70s to bring to light abuses in the electronic surveillance of Americans. One of the committee's first tasks was to work with the Senate Judiciary Committee and with the Ford and Carter administrations from 1976 to 1978 to enact the Foreign Intelligence Surveillance Act. As we take a fresh look at the current law, we will again be working with our colleagues in the Senate Judiciary Committee.

FISA involves both the judicial process on the one hand and the collection of intelligence. Our committee's contribution to this process

MR. MIKE McCONNELL: Good afternoon, Chairman Rockefeller, Vice Chairman Bond, members of the committee. Thank you for inviting us to come today to engage with the Congress on legislation that will modernize the Foreign Intelligence Surveillance Act, as you mentioned, FISA -- I'll refer to it as FISA from this point on -- which was passed in 1978.

In response to your guidance from last year on the need to revise FISA, the administration has worked for over the past year, with many of you and your staff experts, to craft the proposed legislative draft. It will help our intelligence professionals, if passed, protect the nation by preventing terrorist acts inside the United States. Since 1978, FISA has served as the foundation to conduct electronic surveillance of foreign powers or agents of foreign powers inside the United States. We are here today to share with you the criticality -- critical important role that FISA plays in protecting the nation's security, and how I believe the proposed legislation will improve that role, while continuing to protect the civil and the privacy rights of all Americans.

The proposed legislation to amend FISA has four key characteristics. First, it makes the statute technology-neutral. It seeks to bring FISA up to date with the changes in communications technology that have taken place since 1978. Second, it seeks to restore FISA to its original focus on protecting the privacy interests of persons inside the United States. Third, it enhances the government's authority to secure assistance by private entities, which is vital for the intelligence community to be successful. And fourth, it makes changes that will streamline FISA administrative processes so that the intelligence community can use FISA as a tool to gather foreign intelligence information more quickly and more effectively.

The four critical questions, four critical questions that we must address in collection against foreign powers or agents of foreign powers are the following. First, who is the target of the communications? Second, where is the target located? Third, how do we intercept the communications? And fourth, where do we intercept the communications? Where we intercept the communications has become a very important part of the determination that must be considered in updating FISA.

As the committee is aware, I've spent the majority of my professional life in or serving the intelligence community. In that capacity, I've been both a collector of information and a consumer of intelligence information. I had the honor of serving as the director of the National Security Agency from 1992 to 1996. In that position, I was fully aware of how FISA serves a critical function enabling the collection of foreign intelligence information.

In my first 10 weeks on the job as the new director of National Intelligence, I immediately can see the results of FISA-authorized collection activity. The threats faced by our nation, as I have previously testified to this committee, are very complex and there are very many. I cannot overstate how instrumental FISA has been in helping the intelligence community protect the nation from terrorist attacks since September 11th, 2001.

Some of the specifics that support my testimony, as has been mentioned, cannot be discussed in open session. This is because certain information about our capabilities could cause us to lose the capability if known to the terrorists. I look forward to elaborating further on aspects of the issues in a closed session that is scheduled to follow.

I can, however, make the following summary-level comment about the current FISA legislation. Since the law was drafted in a period preceding today's global information technology transformation and does not address today's global systems in today's terms, the intelligence community is significantly burdened in capturing overseas communications of foreign terrorists planning to conduct attacks inside the United States.

Let me repeat that for emphasis. We are significantly burdened in capturing overseas communications of foreign terrorists planning to conduct attacks inside the United States. We must make the requested changes to protect our citizens and the nation. In today's threat environment, the FISA legislation is not agile enough to handle the community's and the country's intelligence needs. Enacted nearly 30 years ago, it has not kept pace with 21st century developments in communications technology. As a result, FISA frequently requires judicial authorization to collect the communications of non-U.S. -- that is, foreign -- persons located outside the United States.

Let me repeat again for emphasis. As a result, today's FISA requires judicial authorization to collect communications of non-U.S. persons -- i.e., foreigners -- located outside the United States. This clogs the FISA process with matters that have little to do with protecting civil liberties or privacy of persons in the United States. Modernizing FISA would greatly improve that process and relieve the massive amounts of analytic resources currently being used to craft FISA applications.

FISA was enacted before cell phones, before e-mail and before the internet was a tool used by hundreds of millions of people worldwide every day.

There are two kinds of communications. It's important to just recapture the fact, two kinds of communications: wire and wireless. It's either on a wire -- could be a copper wire, a fiber wire -- it's on a wire or it's wireless, meaning it's transmitted through the atmosphere.

When the law was passed in 1978, almost all local calls were on a wire. Almost all local calls, meaning in the United States, were on a wire, and almost all long-haul communications were in the air, were known as wireless communications. Therefore, FISA in 1978 was written to distinguish between collection on a wire and collection out of the air or against wireless.

Now in the age of modern communications today, the situation is completely reversed. It's completely reversed. Most long-haul communications -- think overseas -- are on a wire -- think fiberoptic pipe. And local calls are in the air. Think of using your cell phone for mobile communications.

Communications technology has evolved in ways that have had unforeseen consequences under FISA, passed in 1978. Technological changes have brought within FISA's scope communications that we believe the 1978 Congress did not intend to be covered. In short, communications currently fall under FISA that were originally excluded from the act. And that is foreign-to-foreign communications by parties located overseas.

The solution is to make FISA technology-neutral. Just as the Congress in 1978 could not anticipate today's technology, we cannot know what technology may bring in the next thirty years. Our job is to make the country as safe as possible by providing the highest quality intelligence available. There is no reason to tie the nation's security to a snapshot of outdated technology.

Additionally, FISA places a premium on the location of the collection. Legislators in 1978 could not have been expected to predict an integrated global communications grid that makes geography an increasingly irrelevant factor. Today, a single communication can transit the world even if the two people communicating are only located a few miles apart. And yet simply because our law has not kept pace with technology, communications intended to be excluded from FISA are in fact included. There is no real consequence -- this has real consequence on the intelligence community working to protect the nation.

Today intelligence agencies may apply, with the approval of the attorney general and the certification of other high level officials, for court orders to collect foreign intelligence information under FISA. Under the existing FISA statute, the intelligence community is often required to make a showing of probable cause.

Frequently, although not always, that person's communications are with another foreign person overseas. In such cases, the statutory requirement is to obtain a court order, based on a showing of probable cause, that slows, and in some cases prevents altogether, the government's effort to conduct surveillance of communications it believes are significant to national security, such as a terrorist coordinating attacks against the nation located overseas.

This is a point worth emphasizing, because I think many Americans would be surprised at what the current law requires. To state the case plainly: when seeking to monitor foreign persons suspected of involvement in terrorist activity who are physically located in foreign countries, the intelligence community is required under today's FISA to obtain a court order to conduct surveillance. We find ourselves in a position, because of the language in the 1978 FISA statute, simply -- we have not kept pace with the revolution in communications technology that allows the flexibility we need.

As stated earlier, this committee and the American people should know that the information we are seeking is foreign intelligence information. Specifically, this includes information relating to the capabilities, intentions and activities of foreign powers or agents of foreign powers, including information on international terrorist activities. FISA was intended to permit the surveillance of foreign intelligence targets while providing appropriate protection through court supervision to U.S. citizens and other persons located inside the United States.

Debates concerning the extent of the president's constitutional powers were heated in the mid-'70s, as indeed they are today. We believe that the judgment of the Congress at that time was that the FISA regime of court supervision was focused on situations where Fourth Amendment interests of persons in the United States were implicated. Nothing -- and I would repeat -- nothing in the proposed legislation changes this basic premise in the law.

complete understanding of how the statute has been interpreted and how it's being currently used. I don't know how you legislate that way. MR. WAINSTEIN: Well, I understand, but obviously, every time they issue an order, that is -- that can be an interpretation of how the FISA statute is -- interpretation of the FISA statute. And as you know from the numbers that we issue, we have a couple thousand FISAs a year. So that would be quite a few documents.

SEN. FEINGOLD: This is an important matter. If that's the number of items we need to look at, that's the number we will look at.

Thank you, Mr. Chairman.

SEN. ROCKEFELLER: Thank you, Senator Feingold.

Senator Nelson.

SEN. BILL NELSON (D-FL): Mr. Chairman, most of my questions I'm going to save for the closed session, but I would like to ascertain the administration's state of mind with regard to the current law. In the case where there is a foreign national in a foreign land calling into the United States, if you do not know the recipient's nationality and therefore it is possible it is a U.S. citizen, do you have to, in your interpretation of the current law, go and get a FISA order?

MR. McCONNELL: No, sir, not if it -- if the target is in a foreign country and our objective is to collect against the foreign target, and they call into the United States, currently it would not require a FISA. And let me double-check that. I may be -- I'm dated.

LTG ALEXANDER: If it's collected in the United States, it would require a FISA if we do not know who the end is to, or under the program it would have to be collected. If it were known, both ends foreign, known a priori, which is hard to do in this case, you would not. If it was collected overseas, you would not.

SEN. BILL NELSON: Let's go back to your second -- General, your second answer.

LTG ALEXANDER: If you know both ends -- where the call is going to go to before he makes the call, then you know that both ends were foreign; if you knew that ahead of time, you would not need a warrant.

SEN. NELSON: If you knew that.

LTG ALEXANDER: If you knew that.

SEN. NELSON: If you did not know that the recipient of the call in the U.S. is foreign, then you would have to have a FISA order.

LTG ALEXANDER: If you collected it in the United States. If you collected it overseas, you would not.

SEN. NELSON: Well, since in digital communications, if these things -- little packets of information are going all over the globe, you might be collecting it outside the United States, you might be collecting it inside the United States.

MR. McCONNELL: And Senator, that's our dilemma. In the time in 1978 when it was passed, almost everything in the United States was wire, and it was called electronic surveillance. Everything external in the United States was in the air, and it was called communications intelligence.

So what changed is now things in the United States are in the air, and things outside are on wire. That's the --

SEN. NELSON: I understand that, but -- now, I got two different answers to the same question from you, Mr. Director, and from you, General.

MR. McCONNELL: It depends on where the target is and where you collect it. That's why you heard different answers.

SEN. NELSON: So if you're collecting the information in the United States --

MR. McCONNELL: It requires a FISA.

SEN. NELSON: Okay. Under the current law, the president is allowed 72 hours in which he can go ahead and collect information and, after the fact, go back and get the FISA order.

Why was that suspended before in the collection of information?

LTG ALEXANDER: Sir, I think that would best be answered in closed session to give you exactly the correct answer, and I think I can do that.

SEN. NELSON: And -- well, then, you can acknowledge here that is -- it was in fact suspended.

SEN. ROCKEFELLER: I would hope that that would be -- we would leave this where it is.

SEN. NELSON: All right. I'll just stop there.

SEN. ROCKEFELLER: Thank you, Senator Nelson.

Senator Feinstein.

SEN. DIANNE FEINSTEIN (D-CA): Thank you very much, Mr. Chairman. The administration's proposal, Admiral, doesn't address the authority that the president and attorney general have claimed in conducting electronic surveillance outside of FISA. While the FISA Court issued a ruling that authorized the surveillance ongoing under the so-called TSP, Terrorist Surveillance Program, the White House has never acknowledged that it needs court approval. In fact, the president, under this reasoning, could restart the TSP tomorrow without court supervision if he so desired.

Now, Senator Specter and I have introduced legislation which very clearly establishes that FISA is the exclusive authority for conducting intelligence in the United States.

Here's the question: Does the administration still believe that it has the inherent authority to conduct electronic surveillance of the type done under the TSP without a warrant?

EXHIBIT X

HEARING OF THE HOUSE SELECT INTELLIGENCE COMMITTEE
(Embedded image moved to file: pic21722.gif)SUBJECT: THE FOREIGN INTELLIGENCE SURVEILLANCE ACT
(Embedded image moved to file: pic23958.gif)CHAIRED BY: REP. SILVESTRE REYES (D-TX)
(Embedded image moved to file: pic18429.gif)WITNESSES: DIRECTOR OF NATIONAL INTELLIGENCE MIKE MCCONNELL; KENNETH WAINSTEIN, ASSISTANT ATTORNEY GENERAL
IN THE DEPARTMENT OF JUSTICE'S NATIONAL SECURITY DIVISION

1300 LONGWORTH HOUSE OFFICE BUILDING, WASHINGTON, D.C.
9:14 A.M. EDT, THURSDAY, SEPTEMBER 20, 2007

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REP. REYES: (Sounds gavel.) The committee will please come to order. Today the committee will receive testimony from the director of national intelligence, Admiral Michael McConnell, and the assistant attorney general for national security, Mr. Kenneth Wainstein, who is -- who we're waiting on now -- concerning the Foreign Intelligence Surveillance Act, and the recently enacted legislation that expanded the administration's surveillance powers; the Protect America Act, or as commonly referred to, the PAA.

REP. REYES: I want to thank my colleague from California for clarifying the fact that we may be spying on our soldiers.

With that, Director McConnell, you are recognized for your opening statement.

ADM. MCCONNELL: Thank you, Senator, ranking member Hoekstra, members of the committee, a pleasure to appear before you today.

I appreciate the opportunity to discuss the Protect America Act-- I will refer to it as PAA -- and the need for lasting modernization of the Foreign Intelligence Surveillance Act of course we'll refer to as the FISA.

I'm pleased to be joined today by Assistant Attorney General Ken Wainstein of the Department of Justice national security division.

It is my belief that the first responsibility of intelligence is to achieve understanding and to provide warning. AS the head of the nation's intelligence community, it is not only my desire but in fact my duty to encourage changes to policies and procedures, and where needed, legislation to improve our ability to provide warning of terrorist or other attacks to the country.

On taking up this post it became clear to me that our foreign intelligence capabilities were being degraded. I learned that collection using authorities provided by FISA continued to be instrumental in protecting the nation, but due to changes in technology, the law was actually preventing us from collecting foreign intelligence.

I learned that members of Congress in both chambers, and on both sides of the aisle had in fact proposed legislation to modernize FISA, and this was accomplished in 2006. In fact a bill was passed in the House in 2006.

And so the dialog on FISA has been ongoing for some time. This has been a constructive dialog, and I hope it continues in the furtherance of serving the nation to protect our citizens.

None of us want a repeat of the 9/11 attacks, although al Qaeda has stated their intention to conduct another such attack.

When the law was passed in '78 almost all local calls in the United States were on a wire, and almost all international calls were in the air, known as wireless. Therefore FISA was written in 1978 to distinguish between collection on wire and collection out of the air.

Today the situation is completely reversed. Most international communications are on a wire, fiber optic cable, and local calls are in the air. FISA was originally -- FISA also originally placed a premium on the location of the collection. There was the cause of our problem, on a wire, in the United States, equal a warrant requirement even if it was against a foreign person located overseas.

Because of these changes in technology communications intended to be excluded from FISA in 1978 were in fact frequently included in 2007. This had real consequences. It meant the community in a significant number of cases was required to demonstrate probable cause to a court to collect communications of a foreign intelligence target located overseas. And that's very important, and I would emphasize it. Probable cause level of justification to collect against a foreign target located overseas.

Because of this, the old FISA's requirements prevented the intelligence community from collecting important intelligence information on current threats.

In a debate over the summer, and since, I've heard individuals both inside the government and outside assert that the threats to our nation do not justify this authority. Indeed, I've been accused of exaggerating the threat that the nation faces. Allow me to attempt to dispel that notion.

The threats that we face are real, and they are serious. In July of this year we released the National Intelligence Estimate, we refer to it as the NIE, on the terrorist threat to the homeland. The NIE is the community's most authoritative written judgment on a particular subject. It is coordinated among all 16 agencies of the community.

The key judgments from this NIE are posted on a website, and I would encourage all to review the full details.

In short the NIE's assessments stated the following. The U.S. homeland will face a persistent and evolving terrorist threat over the next three years. That's the period of the estimate. The main threats come from Islamic terrorist groups and cells, and most especially al Qaeda.

values. There are three key areas that continue to need attention. For reasons that I've outlined today, it's critical that the FISA's definition of electronic surveillance be amended permanently so that it does not cover foreign intelligence targets reasonably believed to be located outside the United States. Second, I call on Congress to act swiftly to provide retroactive liability protection to the private sector. It is important to keep in mind that the intelligence community often needs the assistance of the private sector to protect the nation. We simply cannot go alone. We must provide protection to the private sector so that they can assist the community in protecting the nation while adhering to their own corporate fiduciary duties. Thirdly, in April 2007 in the bill that we submitted to Congress, we asked for a number of streamlined provisions that would make processing FISA applications more effective and efficient. These changes would substantially improve the FISA process without affecting the important substantive requirements of the law. Finally, we understand and fully support the requirement for the community to obtain a court order or a warrant any time the target for foreign surveillance is located inside the United States. That was true in 1978 when the law was originally passed. It is true today with the update that became law last month.

Mr. Chairman, that completes my remarks. I'd be happy to answer your questions.

REP. REYES: Thank you, Admiral.

With that, we recognize Mr. Wainstein for his opening statement.

MR. WAINSTEIN: Chairman Reyes, Ranking Member Hoekstra and members of the committee, good morning and thank you very much for this opportunity to testify before you again concerning FISA modernization. I'm proud to be here to represent the Department of Justice, and I'm happy to discuss this important issue with you.

The Protect America Act is an important law that has allowed the intelligence community to close intelligence gaps caused by FISA's outdated provisions, and it has already made a difference, it has already made our nation safer. In my statement this afternoon, I'll briefly explain why I believe Congress should make the Protect America Act permanent and also enact other important reforms to the FISA statute. But before I do that, I would like to thank this committee for having me in closed session last week.

And in particular, I'd like to thank you, Chairman Reyes, for proposing that we send you a letter laying out our position on some of the concerns that you and other members of the committee had with certain parts 119 of the Protect America Act, concerns that certain language might permit the government to conduct intelligence activities well beyond those that Congress contemplated when it passed the statute. As the committee is aware, we drafted and sent you that letter last Friday, and it laid out why it is that we don't think those concerns will become a reality in practice. I appreciated the opportunity to engage in that dialogue with you and your colleagues, Chairman Reyes, and I look forward to continuing it here today. I believe that this process will help to reassure Congress and the American people that the act you passed in August is a measured and sound approach to a critically important issue facing our nation.

Let me turn briefly now to why I believe the act should be made permanent. As I explained in my prior testimony, in 1978, Congress designed a judicial review process that applied primarily to surveillance activities within the United States where privacy interests are the most pronounced and not to overseas surveillance against foreign targets where (cognoscible ?) privacy interests are minimal or nonexistent. They did this very much intentionally as they were working against a constitutional backdrop articulated in case law and in legislation that did not extend 4th Amendment protections to foreigners overseas and that left the conduct of foreign intelligence surveillance against foreigners overseas within the ambit and authority of the executive branch.

With this historical backdrop in mind, Congress created a dichotomy in the statute, a dichotomy between domestic surveillance that is governed by FISA, and is therefore subject to FISA court review and approval, and overseas surveillance against foreign targets that is not. Congress established this dichotomy by distinguishing between wire communications which included most of the local and domestic traffic in 1978 and which were largely brought within the scope of the statute and radio communications which included most of the transoceanic traffic of the time and were largely left outside the scope of the statute.

As a result of the revolutions in telecommunications technology over the last 29 years, much of the international communications traffic is now conducted over fiber optic cables which qualify as wire communications under the statute. As a result, many of the surveillances directed at persons overseas which were not intended to fall within FISA became subject to FISA requiring us to seek court authorization before initiating surveillance and effectively conferring quasi-constitutional protections on terrorist suspects overseas. This process impaired our surveillance efforts and diverted resources that were better spent protecting the privacy interests of Americans here in America.

As the committee is aware, the administration had submitted to 120
Congress a comprehensive proposal in April that would remedy this problem and provide a number of other refinements and important changes to the FISA

EXHIBIT Y

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

AMERICAN CIVIL LIBERTIES UNION; AMERICAN CIVIL LIBERTIES UNION FOUNDATION; AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN; COUNCIL ON AMERICAN-ISLAMIC RELATIONS; COUNCIL ON AMERICAN-ISLAMIC RELATIONS MICHIGAN; GREENPEACE, INC.; NATIONAL ASSOC. OF CRIMINAL DEFENSE LAWYERS; JAMES BAMFORD; LARRY DIAMOND; CHRISTOPHER HITCHENS; TARA MCKELVEY; and BARNETT R. RUBIN,

Plaintiffs,

v.

CIVIL ACTION
NO. 06-10204

NATIONAL SECURITY AGENCY/CENTRAL SECURITY SERVICE; and LIEUTENANT GENERAL KEITH B. ALEXANDER, in his official capacity as Director of the National Security Agency and Chief of the Central Security Service,

Defendants.

_____________________________________/

MOTION FOR PARTIAL SUMMARY JUDGMENT
BEFORE THE HONORABLE ANNA DIGGS TAYLOR
United States District Judge
231 Lafayette Boulevard West
Detroit, Michigan
Monday, June 12, 2006

APPEARANCES:

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- - -

TO OBTAIN CERTIFIED TRANSCRIPT:
Andrea E. Wabeke, CSR, RMR, CRR
734.741.2106 x1144

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monitoring. And as a result of that actual action by the Government against those targets, the court said, well, there was a decrease in attendance at church and people were concerned but it was not speculation, it was something the Government did.

Here, their claims of standing are based on allegations that we're actually surveilling them and those are just based on an assumption that is not founded in fact. It sounds like, and I haven't read this case because she didn't cite it in her brief, it sounds like the Socialist Workers Party case is the same thing. The Government attended the meeting or threatened to attend the meeting, and therefore it was an actual injury to those who were there.

The point I'm trying to make, your Honor, is that if you want to get standing based on an allegation of subjective chill, the Government must actually do something to you and that must be clear. You don't have standing just by saying a program exists, we're modifying our behavior because we think it might cover us, and that's what their claims are, and it's not sufficient.

Now, let me address more specifically the argument that those attorneys who would represent terrorist clients have standing. I certainly

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recognize that in that respect, those plaintiffs come closer to being in the ballpark with the terrorist surveillance program, as opposed to the plaintiffs who say I'm inhibited from talking to my families in the Middle East and Asia, as if that somehow everybody in the Middle East and Asia is related to Al Qaeda, or I can't talk about political topics, or I can't talk about the war or I can't talk about human rights in China. Those folks are out of the box completely. Those attorneys who say, however, I represent Al Qaeda, they seem closer to being within the framework of the terrorist surveillance program.

But a couple points about that, your Honor. One is, as the court in United Presbyterian pointed out in the D.C. Circuit case, claims by a plaintiff that they're more likely for some reason to be subject to surveillance based on their activities is not enough. It may indeed be the case that plaintiffs who represent terrorist suspects are more likely to be subject to the program, but that doesn't adequately establish standing because it still doesn't show that they've actually been subject to any surveillance.

Judge Scalia wrote: That kind of allegation does not adequately aver that the specific action is threatened or even contemplated against them. And so

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EXHIBIT Z

TOP SECRET[redacted]

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

FAC No. SDG-392566
[redacted]

Date: February 6, 2008

MEMORANDUM FOR **ADAM J. SZUBIN**
DIRECTOR
OFFICE OF FOREIGN ASSETS CONTROL

FROM: Howard Mendelsohn HM 2/6/08
Deputy Assistant Secretary, Office of Intelligence and Analysis

SUBJECT: (U) Redesignation of Al-Haramain Islamic Foundation locations in the United States (**AHF-OREGON**), and AHF official **Soliman AL-BUTHE** pursuant to E.O. 13224

(U) INTRODUCTION

(U) President Bush issued Executive Order 13224 (E.O.) on September 23, 2001 declaring a national emergency to address grave acts of terrorism and threats of terrorism committed by foreign terrorists, including the September 11, 2001 terrorist attacks in New York, Pennsylvania, and the Pentagon. The E.O. authorizes the Secretary of the Treasury, in consultation with the Secretaries of State and Homeland Security,[1] and the Attorney General, to designate those persons determined to be:

(1) owned or controlled by, or to act for or on behalf of those persons listed in the Annex to the E.O., or those determined to be subject to subsection 1(b), 1(c), or 1(d)(i) of the E.O.;
(2) assisting in, sponsoring, or providing financial, material, or technological support for, or financial or other services to or in support of, such acts of terrorism or those persons listed in the Annex to E.O. 13224 or determined to be subject to the E.O.; or
(3) associated with those persons listed in the Annex, or those persons determined to be subject to subsection 1(b), 1(c), or 1(d)(i) of the E.O.

(U) The following evidence in the files of the Office of Foreign Assets Control (OFAC) provides reason to believe that the entity and individual named below satisfy the criteria for designation pursuant to Executive Order 13224, "Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism."

(U) [Note: The name of the individual and entity proposed for redesignation in this memorandum will appear throughout the following text in **BOLD CAPITAL** font, while the names of persons previously designated as Specially Designated Global Terrorists (SDGT) pursuant to E.O. 13224 will appear in **Bold Title** font.]

Redacted and released for Case # 07-CV-1155-KI U.S. District Court for the District of Oregon 3/3/08

[redacted]
Derived from: Multiple Sources
Declassify on: [redacted]

[1] (U) E.O. 13224 was amended by E.O. 13284 (January 23, 2003) adding the Secretary of Homeland Security to the consultative process.

TOP SECRET[redacted]

[redacted]

(U) Soliman AL-BUTHE

(U) **AL-BUTHE** has been identified as the Treasurer of **AHF-OREGON**, according to the U.S. **AHF-OREGON** tax form 990 for 2001 filed with the IRS. [Source: **AHF-OREGON** Tax Form 990, 2001, Exhibit 39] Resident in Riyadh, Saudi Arabia, **AL-BUTHE** also reportedly assisted in the establishment of **AHF-OREGON**, and served as the chairman of AHF's U.S. Committee, according to an Affidavit in Support of an Application for Search Warrant and local news reports. [Source: United States District Court, District of Oregon, Affidavit in Support of an Application for search Warrant, Exhibit 95; The Oregonian, January 10, 2004, Exhibit 121; The Sunday Oregonian, November 9, 2003, Exhibit 103] In a document signed by **AHF's** leader **Al-Aqil**, AHF in Saudi Arabia appointed **AL-BUTHE** "true and lawful attorney in [AHF's] name, place and stead," apparently giving **AL-BUTHE** broad legal authority to act on AHF's behalf in the U.S. [United States District Court, District of Oregon, Affidavit in Support of an Application for Search Warrant, Exhibit 95]

(S [redacted] [Source: Knight Ridder/Tribune News Service, June 3, 2003, Exhibit 123; [redacted] **AL-BUTHE**'s role as a senior AHF official is corroborated in part by information obtained by the FBI. A letter drafted on AHF "head office-Riyadh" stationery identifies **AL-BUTHE** as the President of AHF's Internet Committee. [Source: Copy of Government Exhibit F139a, Exhibit 127]

(U) Other evidence shows that **AL-BUTHE** had signature authority to sign contracts on behalf of AHF's head office in Riyadh, Saudi Arabia. On or about February 15, 2002, a "Memorandum of Agreement" showed that **AL-BUTHE** represented AHF in an agreement that was signed with a U.S. party for the development and distribution of religious materials. [Source: Government Exhibit F67A, Exhibit 128] In two other related contracts, **AL-BUTHE** also represented AHF in signing agreements. [Source: Copy of Government Exhibit F61A, Exhibit 129; E010(4B36-31-098 to 100), Exhibit 130]

[redacted]

(U) On February 18, 2004, Federal law enforcement authorities executed a search warrant against property purchased on behalf of **AHF-OREGON**. The search was conducted pursuant to a criminal investigation into possible violations by **AL-BUTHE** (and Seda) of the Internal Revenue Code, the Money Laundering Control Act and the Bank Secrecy Act. In a separate administrative action, OFAC blocked pending investigation AHF accounts and real property in the U.S. to ensure the preservation of AHF assets pending further investigation. [Source: U.S. Department of Treasury, Press Room, February 19, 2004, Exhibit 94; United States District Court, District of Oregon, Affidavit in Support of an Application for Search Warrant, Exhibit 95]

[redacted]

(U) Additional Information on **Soliman AL-BUTHE**

[redacted]

(U//FOUO) **AL-BUTHE** and Seda were involved with the withdrawal of funds from the **AHF-OREGON** branch office bank account during March 2000. The withdrawn funds included a $150,000 contribution from Dr. Mahmoud Talaat El-Fiki. In a February 20, 2000 email to "haramain" notifying the organization of Fiki's contribution it was indicated that the money was given "as Zakat in order to participate in your noble support to our muslim brothers in Chychnia."[39] Also noted in the email was "our previous correspondence," and the fact that a request was made to Fiki's bank in London "to make a transaction to your USA account, *using*

[redacted]

the details you provided in an earlier email...," (emphasis added). The money subsequently was transported by **AL-BUTHE** to Saudi Arabia, at which point it is believed to have been sent to mujahideen in Chechnya. [Source: Pretrial Detention Request, Exhibit 156; Accompanying exhibit L of the Pretrial Detention Request, Exhibit 210]

(U) In support of the request for reconsideration of the designation of **AL-BUTHE**, **AL-BUTHE** counsel informed OFAC via correspondence that **AL-BUTHE** first learned of Fiki's contribution during early March 2000 – this despite the February 20, 2000 Fiki-related email which referenced "previous correspondence" and "details...provided in an earlier email." [Source: Correspondence from **AL-BUTHE** attorney Thomas Nelson to OFAC, January 19, 2005, Exhibit 154; accompanying exhibit L of the Pretrial Detention Request, Exhibit 210] The attorney correspondence also indicated that "**AL-BUTHE** is uncertain why Dr. Fiki (whom Mr. **AL-BUTHE** has never met) sent the contribution to the United States instead of Saudi Arabia," but **AL-BUTHE** "speculates that there probably are fewer restrictions on [affecting] such transfers into the United States." **AL-BUTHE** also speculated that Fiki may have responded to "website instructions or advertisements that had been published in Islamic magazines directing contributions to the United States." That speculation, however, appears inconsistent with the aforementioned reference to "previous correspondence" and with the fact that Fiki's contribution to the U.S. bank account was completed "using details...provided in an earlier email." [Source: Correspondence from **AL-BUTHE** attorney Thomas Nelson to OFAC, January 19, 2005, Exhibit 154; accompanying exhibit L from the Pretrial Detention Request, Exhibit 210]

(TS[redacted]In support of the request for reconsideration of the designation of **AL-BUTHE**, **AL-BUTHE** counsel also informed OFAC via correspondence that **AL-BUTHE** worked on the Saudi-based AHF website as early as 1993, and continued in this work as late as March 2000. Moreover, the letter indicated that the very purpose of **AL-BUTHE's** trip to the United States during March 2000 was to assist "in establishing an Islamic website, IslamToday."[40] Additionally, it is elaborated in the correspondence that **AL-BUTHE's** role with the AHF evolved over time to the point at which he became "responsible for internet activities and then for charitable works in the United States."[41] [Source: Correspondence from **AL-BUTHE** attorney Thomas Nelson to OFAC, January 19, 2005, Exhibit 154] According to the indictment of Seda and **AL-BUTHE**, the AHF website (www.alharamain.org), as of 1999 and 2000, contained numerous articles supportive of the Chechen mujahideen, to include reports such as "The Latest News About Jihaad in Chechnya." The website also contained a prayer for Chechen mujahideen, referring to them as the "Mujahideen brothers in Chechnya." The indictment further indicates that a link was provided via the AHF website to www.qoqaz.com, through which details could be obtained on how to fund Chechen mujahideen.[42] [Source: Copy

[40] (U) The March 2000 trip referenced here is the same trip during which Fiki's $150,000 contribution was withdrawn from the **AHF-OREGON** account and transported by **AL-BUTHE** from the United States to Saudi Arabia. [Source: Correspondence from **AL-BUTHE** attorney Thomas Nelson to OFAC, January 19, 2005, Exhibit 154]

[redacted]

of Indictment in U.S. v. AL-HARAMAIN ISLAMIC FOUNDATION, INC.; Pirouz SEDAGHATY, a/k/a Pete Seda, Perouz Seda Ghaty and Abu Yunus; and Soliman Hamd **AL-BUTHE**, Exhibit 165] Thus, an argument that **AL-BUTHE** was ignorant of AHF facilitation (e.g. via qoqaz.com) of funding of the Chechen mujahideen would be questionable given his internet-related responsibilities, his overt acts (transporting the $150,000 Fiki contribution), his official position with the AHF and its Oregon branch (supportive of Chechen mujahideen).[redacted] [Source: Correspondence from **AL-BUTHE** attorney Thomas Nelson to OFAC, January 19, 2005, Exhibit 154; letter presumably from **AL-BUTHE** identifying him as the President of the "Internet Committee" of AHF-Riyadh, Exhibit 127; copy of Indictment in U.S. v. AL-HARAMAIN ISLAMIC FOUNDATION, INC.; Pirouz SEDAGHATY, a/k/a Pete Seda, Perouz Seda Ghaty and Abu Yunus; and Soliman Hamd **AL-BUTHE**, Exhibit 165;[redacted]

[redacted]

([redacted] Intercepts disclosed during Al-Timimi's trial (Al-Timimi was [redacted] convicted and sentenced to life in prison) reveal a relationship between Al-Timimi and **AL-BUTHE. AL-BUTHE** was intercepted in some four conversations with Al-Timimi. In an intercept on February 1, 2003, at 15:38 Al-Timimi spoke with FNU LNU,[46] (subsequently determined to be **Soliman AL-BUTHE**). [**Source**: Copy of United States of America v. Ali Al-Timimi, United States District Court for the Eastern District of Virginia, Exhibit 168; Stipulations 17-24, United States District Court for the Eastern District of Virginia, Exhibit 204] During the conversation, FNU LNU provided Al-Timimi with the following fax number: 966-12066331. During the same intercept, FNU LNU passed the telephone to Ahmad LNU. After a brief conversation, Al-Timimi told Ahmad LNU to ask "Sulayman," (likely **Soliman AL-BUTHE**) to call him (Al-Timimi) the next day so that Al-Timimi could dictate something to "Sulayman." That same day at 16:20 Al-Timimi again was intercepted speaking to FNU LNU (subsequently determined to be **Soliman AL-BUTHE**). [**Source**: GX 10B4A, Copy of Ali Al-Timimi Telephone Intercept Linesheet, Exhibit 206; Stipulations 17-24, United States District Court for the Eastern District of Virginia, Exhibit 204] During the conversation FNU LNU provided Al-Timimi with the following U.S. telephone (probable fax) number: 253-981-9150. An internet query links both aforementioned telephone numbers with ICSFP.com and sb@whymuhammad.net. The latter internet addresses, per the Internet search, correspond both to the International Committee for the Support of the Final Prophet (ICSFP) and the Office of the Campaign to Defend the Prophet. The query also indicates that **AL-BUTHE** is the President of the ICSFP. [Source: Internet query printout relating to telephone numbers 966-120066331 and 253-981-9150, Exhibit 207]

[redacted]

[46] (U) GX 10B3A, Copy of Ali Al-Timimi Telephone Intercept Linesheet, Exhibit 205. "FNU LNU" refers to First Name Unknown, Last Name Unknown.

[redacted]

(U) CONCLUSION

(U) **AL-BUTHE** should be determined to be subject to Executive Order 13224 for the following reason:

- By serving as a senior AHF official, **AL-BUTHE** has acted for or on behalf of, has assisted in, sponsored, or provided financial, material, or technological support for, or financial or other services to or in support of **Al Qaida** and other SDGTs.

(U) **AHF-OREGON** should be determined to be subject to Executive Order 13224 for the following reasons:

- **AHF-OREGON** has been owned or controlled by, or has acted for or on behalf of **Al-Aqil**.
- **AHF-OREGON** has been owned or controlled by, or has acted for or on behalf of **AL-BUTHE.**
- As a branch of the Saudi charity Al-Haramain Islamic Foundation, **AHF-OREGON** has acted for or on behalf of, or has assisted in, sponsored, or provided financial, material, or technological support for, or financial or other services to or in support of **Al Qaida** and other SDGTs.

[redacted]

EXHIBIT AA

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Lynn Sweet

The scoop from Washington

Justice Department concludes Dr. Bruce Edwards Ivins--who killed himself last week--responsible for 2001 deadly anthrax attack. Press conference transcript.

By Lynn Sweet**on August 6, 2008 7:18 PM** | Permalink | Comments (2)

"There's plenty of evidence in this case of all types. We have a flask that's effectively the murder weapon, from which those spores were taken, that was controlled by Dr. Ivins. The anthrax in that flask was created by Dr. Ivins. We have the suspicious behavior that he had undertaken over the years." --Jeff Taylor, the United States Attorney for the District of Columbia.

TRANSCRIPT OF AMERITHRAX INVESTIGATION PRESS CONFERENCE

WASHINGTON, D.C.

3:40 P.M. EDT

MR. TAYLOR: Good afternoon. I'm Jeff Taylor, the United States Attorney for the District of Columbia. I am joined here today by Joseph Persichini; Assistant Director in Charge of the FBI's Washington Field Office; Chief Postal Inspector Alexander Lazaroff; and Assistant U.S. Attorney Ken Kohl.

As the Department indicated last week and has been widely reported, substantial progress has been made in the Amerithrax investigation in recent years. As you know, this investigation into the worst act of bioterrorism in U.S. history has been one of the largest and most complex ever conducted by the FBI. The U.S. Postal Inspection Service has also made an extraordinary contribution to this investigation. Over the past seven years, hundreds of thousands of agent-hours have been dedicated to solving this crime as well as I may add, many hours of prosecution time.

Ordinarily, we do not publicly disclose evidence against a suspect who has not been charged, in part because of the presumption of innocence. But because of the extraordinary and justified public interest in this investigation, as well as the significant public attention resulting from the death of Dr. Bruce Edwards Ivins last week, today we are compelled to take the extraordinary step of providing first, the victims and their

SEARCH
Search
CATEGORIES
2008 Race for th (1492)
Barack Obama (
Dick Durbin (33)
Hillary Rodham
John McCain (1
Michelle Obama
Obama World T
Obamaville (48)
Rahm Emanuel
MONTHLY ARC
August 2008 (12
July 2008 (135)
June 2008 (203)
May 2008 (147)
April 2008 (155)
March 2008 (13
February 2008 (
January 2008 (1
December 2007
November 2007
October 2007 (1
September 2007

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the DNA fingerprint of individual batches of anthrax had not been developed. The FBI sought out the best experts in the scientific community and, over time, four highly sensitive and specific tests were developed that were capable of detecting the unique qualities of the anthrax used in the 2001 attacks.

That is to say, this investigation took our agents and scientists to new territory. An extraordinary amount of research and testing needed to achieve these groundbreaking accomplishments required months and years of trial and error analysis and review.

We were then able to trace that to an individual lab, a single flask, and one individual who controlled it. Further, painstaking investigation lead us to the conclusion that Dr. Bruce E. Ivins was responsible for the death, sickness and fear brought to our country by the 2001 anthrax mailing, and that it appears, based on the evidence, that he was acting alone.

In closing, I sincerely hope that the documents we have released today provide an overview of our investigation of the 2001 anthrax mailings, our scientific accomplishments and the conclusion made regarding Dr. Ivins.

Thank you.

MR. TAYLOR: We're happy to take some questions.

QUESTION: Can you explain, please, why you would tell a target or someone that you believed that he -- that there was a killer who had a weapon of mass destruction, and then allow that person continued access to a lab working with -- still having access to some of those substances?

MR. TAYLOR: With respect to the access he actually had, I'll refer to the Department of Defense. However, when the investigation began to focus on Dr. Ivins, the lab was notified of our concerns about him. With respect to what was done after that, I'll refer you to the Department of Defense.

Jim.

QUESTION: A question for Mr. Persichini. You build -- this is obviously, at this point, a circumstantial case. You build a strong circumstantial case. What direct evidence do you have? For instance, do you have any tape that was used on the envelope that was recovered from his home? Do you have any other -- any other evidence that clearly would link him? For instance, in the affidavit, it mentions that people of this sort often keep souvenirs. Did you find anything like that at his home?

MR. PERSICHINI: Well first, I would refer back to the documents, because that's the purpose of our press conference today, to provide you the documents and the information pertained in the documents. As it relates to admitting evidence into it, I'm going to refer back to Jeff. But again, we're looking at the document itself and the purpose of our release and providing this information to the families. That's first and foremost for us. So I won't discuss the actuality of evidence, then.

MR. TAYLOR: Let me talk for a minute about the circumstantial evidence notion directives. As I've just laid out, there's plenty of evidence in this case of all types. We have a flask that's effectively the murder weapon, from which those spores were taken, that was controlled by Dr. Ivins. The anthrax in that flask was created by Dr. Ivins. We have the suspicious behavior that he had undertaken over the years. We have, in addition, the mail envelopes with the tool stamp defects I had mentioned.

But again, back to circumstantial evidence -- thousands of prosecutors in thousands of courthouses prove cases beyond a reasonable doubt using circumstantial evidence. In fact, the standard jury instruction given by judges across the country is that a jury can consider circumstantial evidence and direct evidence, and they both can be given equal weight depending on the jury's view. So, again, circumstantial evidence? Sure, some of it is. But it's compelling evidence and our view is we are confident it would have helped us prove this case against Dr. Ivins beyond a reasonable doubt.

Yes.

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EXHIBIT BB

Contact Us
- Your Local FBI Office
- Overseas Offices
- Submit a Crime Tip
- Report Internet Crime
- More Contacts

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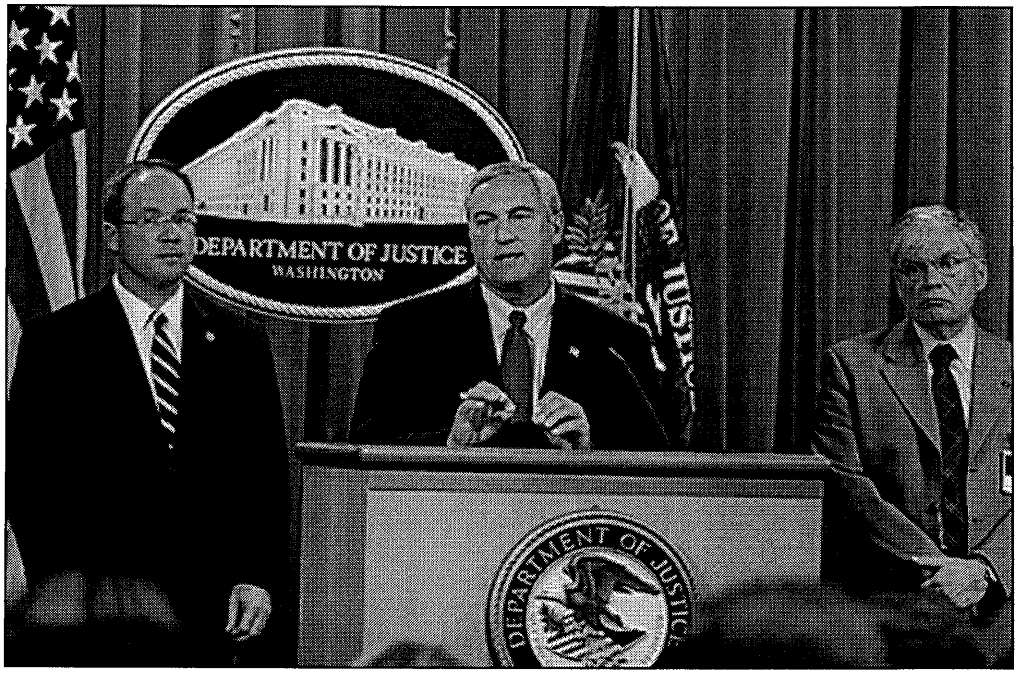
ANTHRAX INVESTIGATION
Closing a Chapter

08/06/08



Joseph Persichini (center), Assistant Director in Charge of the FBI's Washington Field Office, with U.S. Attorney Jeff Taylor (left), District of Columbia, and Chief Postal Inspector Alexander Lazaroff of the U.S. Postal Service, explains recent developments in the government's Amerithrax case.

The victims and family members of the 2001 anthrax mailings have waited patiently for near seven years to find out who was responsible for the worst case of bioterrorism in U.S. histor This morning during a special briefing at FBI Headquarters, Director Robert Mueller provide answers. The briefing took place several hours before the **public release of documents** re to the investigation.

SHARE

While updating victims and their families on the case—in which five people were killed and 17 were sickened—Mueller said that "the pain and suffering the attac caused the victims and their families was in the minds of all the investigators" as they tireles worked to solve the case. That pain and suffering, he added, "has never, ever been lost to u

This afternoon during a press conference, Department of Justice and FBI officials highlighted some of the information contained in the just-released Amerithrax documents, explaining why charges were about to be brought against anthrax researcher Dr. Bruce Ivins, who took his own life before those charges could be filed.

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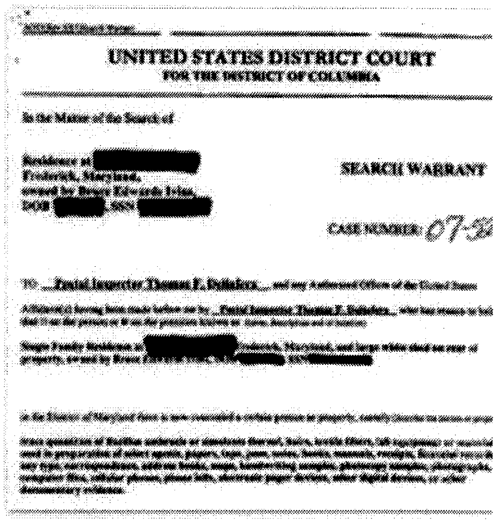
U.S. Attorney Jeff Taylor, District of Columbia, said that normally evidence against a suspect who has not been charged is not publicly released, in part because of the presumption of innocence. "But," added Taylor, "because of the extraordinary public interest in this investigation...we are compelled to take the extraordinary step of providing the victims, their families, Congress, and the American public with an overview of some recent developments as well as some of our conclusions."

Because of Ivins' death, the government will not be able to present its case in court. But according to Assistant Director in Charge Joseph Persichini, FBI Washington Field Office, "Bruce Ivins was responsible for the death, sickness, and fear brought to our country by the 2001 anthrax mailings."


UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
[redacted]
SEARCH WARRANT
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CASE NUMBER: 07-
[redacted]

Read: Court records related to Amerithrax case

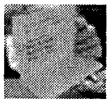
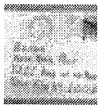

Photo Gallery: Tainted Envelopes

The Amerithrax investigation is one of the largest an most complex investigations ever conducted by law enforcement. The Amerithrax Task Force, comprisec 17 special agents and 10 U.S. postal inspectors, has conducted more than 9,100 interviews, executed more than 70 searches, and followed lead: across six continents. Along the way, a brand new science was developed that ultimately le the big break in the case.

That science—creating a DNA equivalent of a fingerprint—allowed investigators to pinpoint the origins of the anthrax. The FBI Laboratory, in conjunction with the best experts in the scientific community, developed four highly sensitive and specific tests to detect the unique qualities of the anthrax used in the 2001 attacks. This took several years to accomplish, but in early 2005 the groundbreaking research successfully identified where the anthrax used in the mailings had come from.

By the Numbers
- 5: deaths caused by anthrax
- 17: persons sickened
- 17: FBI agents assigned to c
- 10: Postal Inspectors on cas
- 9,100: interviews conducted
- 26,000: e-mails reviewed
- 75: searches conducted
- 6: continents canvassed

Another key piece of evidence was provided when investigators were able to identify a limite geographic area where the anthrax envelopes were purchased based on a forensic investig that revealed printing defects in certain batches of envelopes.

In 2006, speaking about the investigation, Persichini said investigators were frustrated that r arrests had been made, but that "no one in the FBI has, for a moment, stopped thinking abo innocent victims of these attacks...The FBI's commitment to solving this case is undiminishe

Today, Persichini was able to tell the American public that a chapter on one of the most heir crimes committed against the citizens of the United States has been closed.

Resources:
- Amerithrax Investigation
- Linguistic and Behavioral Analysis (2001)
- The Search for Anthrax
- Details and Images of Letter to Sen. Patrick Leahy

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Headline Archives home

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EXHIBIT CC

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No. 07-468

In the Supreme Court of the United States

AMERICAN CIVIL LIBERTIES UNION, ET AL.,
PETITIONERS

v.

NATIONAL SECURITY AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
JEFFREY S. BUCHOLTZ
Acting Assistant Attorney
General
DOUGLAS N. LETTER
THOMAS M. BONDY
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether petitioners have standing to seek pros pective equitable relief against a foreign intelligence-gathering program that no longer exists, without any evidence that they were ever surveilled under that pro gram.

2. Whether petitioners' prospective challenge to the program is justiciable despite the fact that the program no longer exists.

In the Supreme Court of the United States

No. 07-468

AMERICAN CIVIL LIBERTIES UNION, ET AL.,
PETITIONERS

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That conclusion follows directly from Laird. In Laird, "most if not all of the [plaintiffs]" established that they had "been the subject of Army surveillance reports." Tatum v. Laird, 444 F.2d 947, 954 n.17 (D.C. Cir. 1971), rev'd on other grounds, 408 U.S. 1 (1972). They argued that the surveillance of their activities had "chill[ed]" their exercise of First Amendment rights. Laird, 408 U.S. at 13. This Court nevertheless held that the plaintiffs failed to demonstrate "a direct injury as the result of [the government's] action," because their decision to curtail their expressive activity reflected a "subjective 'chill'" that did not qualify as a "specific present objective harm or a threat of specific future harm." Id. at 13-14 (citation omitted).

The Court in Laird explained that "none" of its deci sions in which government action violated the First Amendment because of its "'chilling' effect" on expres sive activity found standing based on a plaintiff's knowl edge of government activity and his "fear that, armed with the fruits of those activities, the [government] might" take other injurious action. 408 U.S. at 11. Rather, those cases involved harms directly caused by "the challenged exercise of governmental power" be cause the "complainant was either presently or prospec tively subject to the regulations, proscriptions, or com pulsions that he was challenging." Ibid.

Petitioners argue (Pet. 23) that Laird merely held that a plaintiff must prove some injury to establish standing. But the injuries alleged by petitioners all re sult from an alleged chilling effect on their communica tions, and that is precisely what Laird held insufficient to confer standing. Indeed, petitioners' asserted injury is even weaker than the one rejected in Laird. As Judge Batchelder explained, petitioners rely in large part on alleged injuries caused by alleged decisions of third parties-their foreign contacts-to cease communicating with them. See Pet. App. 116a-117a. A chilling effect on third parties is an even less appropriate basis for stand ing than a chilling effect on petitioners themselves. See ibid. Because "a federal court [may] act only to redress injury that fairly can be traced to the challenged action of the defendant," Simon v. East Ky. Welfare Rights Org., 426 U.S. 26, 41 (1976), standing is ordinarily "sub stantially more difficult" to establish where the claimed injury is the result of the independent actions of third parties. Lujan v. Defenders of Wildlife, 504 U.S. 555, 562 (1992) (citation omitted).

That does not mean, as petitioners suggest (Pet. 14), that no plaintiff will ever have standing to challenge any government surveillance program. The district court's unchallenged state secrets determination precludes peti tioners from attempting to prove their standing to chal lenge the TSP. But the state-secrets privilege is not lightly invoked, and the government's assertion of the privilege is subject to judicial review, as it was by the district court (which concluded that it was properly in voked by the government here). See Pet. App. 16a-17a; United States v. Reynolds, 345 U.S. 1, 8 (1953). More over, if the government sought to use the results of any surveillance against a person, that person might be able to prove standing based on the government's disclosure of the surveillance and any injury caused by the at tempted use. In any event, it is well settled that "[t]he assumption that if [petitioners] have no standing to sue, no one would have standing, is not a reason to find stand ing." Pet. App. 130a (quoting Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 227 (1974)).3

d. Even if petitioners had established a relevant injury, they would still lack standing because they could not prove that the TSP caused their asserted injury or that the injury would be redressed by an injunction against the TSP. Cf. Defenders of Wildlife, 504 U.S. at 560-562. Under petitioners' own theory, the people they would like to telephone are suspected terrorists who might be subject to FISA-authorized surveillance or surveillance by their own (foreign) governments. See Pet. App. 114a. Thus, even if a chilling effect could give rise to a cognizable injury for standing purposes, it is at best speculative to assert that any chilling effect was caused by the TSP, as opposed to other sources, or that any injury from a chilling effect would be redressed by enjoining the TSP. As Judge Batchelder explained, peti tioners "have neither asserted nor proven any basis upon which to justifiably conclude that the mere 141

2 The Al-Haramain court remanded for the district court to deter mine, in the first instance, whether FISA preempts the state secrets privilege. 2007 WL 3407182, at *14. That question is not presented here because petitioners have not challenged the applicability of the state secrets privilege and, in any event, have never claimed, in the lower courts or in their petition for a writ of certiorari, that FISA dis places that privilege. Moreover, no court has ever held that FISA has that effect.

3 Nor are petitioners (Pet. 15, 19, 26) correct that, under the court of appeals' decision, a plaintiff must prove surveillance "with certainty." Proof by a preponderance of the evidence would suffice. Here, how ever, petitioners' contention that they have been surveilled is "purely speculative." Pet. App. 163a (Gibbons, J., concurring in the judgment). As Judge Batchelder explained, "[t]he evidence establishes only a pos sibility not a probability or certainty that these communications might be intercepted." Id. at 128a (second emphasis added).

4 Petitioners' reliance (Pet. 26) on environmental cases is misplaced for similar reasons. See Pet. App. 154a-155a; id. at 161a-164a (Gibbons, J., concurring in the judgment). An environmental plaintiff can gene rally establish standing by showing that he uses an area affected by pollution and has reduced that use because he reasonably fears injury from the pollution. See, e.g., Friends of the Earth, Inc. v. Laidlaw Env'tl Servs., Inc., 528 U.S. 167, 183-184 (2000). As Judge Batchelder explained, however, just as environmental plaintiffs cannot establish standing "without any evidence that the defendant has polluted their particular river," petitioners here cannot establish standing without "evidence that the government has intercepted their particular com munications." Pet. App. 155a; see id. at 161a (Gibbons, J., concurring in the judgment) (emphasizing that, in Laidlaw, "the plaintiffs * * * were in fact subject to defendant's conduct"). Thus, for example, in Laidlaw, the plaintiff submitted detailed declarations from its members explaining that they had direct exposure to the waterborne pollution at issue in that case. See 528 U.S. at 181-183. Petitioners here, by con trast, cannot show that they have ever been subject to the activity about which they complain.

5 At least one such case is pending, along with dozens of other cases involving related issues that have been consolidated for pretrial purpos es in a multi-district litigation proceeding in In re NSA Telecommuni cations Records Litigation, MDL No. 06-1791 (N.D. Cal.). Unlike this case, many of those cases involve claims for retrospective monetary relief.

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